FIRST AMENDED COMPLAINT

98 Civ. 2680 (MBM)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FREE SPEECH, by its Member GREG RUGGIERO, STEAL THIS RADIO, DJ THOMAS PAINE, DJ CARLOS RISING, DJ SHARIN, DJ.E.S.E., FRANK MORALES, and JOAN N MUSSEY,

Plaintiffs,

- against -

JANET RENO, as Attorney General of the United States, UNITED STATES DEPARTMENT OF JUSTICE and FEDERAL COMMUNICATIONS COMMISSION,

Defendants.

Plaintiffs, by their attorneys, respectfully allege on information and belief as follows:

INTRODUCTION

This action is brought on behalf of persons and organizations engaged in, or seeking to engage in, "microradio" (low-power radio) broadcasting in New York City ("City"). Plaintiff Free Speech is an unincorporated association of persons who have joined together to foster the development of microradio stations in the City. Plaintiff Steal This Radio is an unincorporated association of persons who have collectively operated a microradio station on the City's Lower East Side since November 1995, providing an important outlet for individuals and community groups on the Lower East Side to share their views and disseminate local news and information. Broadcasting every evening at 88.7 megahertz on the FM dial with only 20 watts of power, Steal This Radio has developed a significant listening audience among Lower East Side residents and community groups who tune in to the station because they cannot otherwise find local news and information on events of relevance to their daily lives on the radio dial. Plaintiffs Free Speech and Steal This Radio each sue on their own behalf and on behalf of their members. The individually named plaintiffs either produce or present programming broadcast over Steal This Radio or listen to the broadcasts of Steal This Radio.

Even though plaintiffs lack broadcast licenses from the Federal Communications Commission ("FCC"), they do not regard themselves as radio "pirates." Instead, they claim a First Amendment right to speak over the electromagnetic spectrum dedicated to radio broadcasting -- an electronic public forum of virtually unlimited character -- subject only to reasonable time, place and manner regulations that are even-handedly applied to all broadcasters, full-power and low-power alike. Plaintiffs maintain that the present regulatory scheme for radio broadcasting, codified in Title III of the Communications Act of 1934 (the "Act"), as amended, 47 U.S.C. §§ 301 et seq., on its face and as applied to microradio stations, violates their right to freedom of speech under the First Amendment to the United States Constitution.

Plaintiffs seek declaratory relief holding the Act to be unconstitutional to the extent that it: (i) requires microradio stations to first obtain broadcast licenses from the Federal Communications Commission ("FCC") before they can broadcast in the electronic public forum dedicated to radio broadcasting, even though that requirement burdens substantially more speech, including core political speech, than necessary to serve the government's interest in preventing signal interference and ensuring public safety and effectively suppresses a large amount of protected expression, including core political speech; (ii) authorizes the FCC to grant broadcast licenses to use exclusively assigned frequencies (either in a given region or on a nationwide basis) to a relatively few broadcast radio stations which are collectively owned by even fewer media companies, thus effectively allowing a select group of favored speakers to monopolize and therefore limit speech in the electronic public forum dedicated to radio broadcasting; (iii) gives the FCC virtually unfettered discretion to

decide who broadcasts (and who must remain silent) in the electronic public forum dedicated to radio broadcasting and under what conditions; (iv) authorizes the FCC to auction off broadcast licenses to radio stations, thus effectively allowing the agency to tax, and thereby infringe upon, the exercise of First Amendment rights in the electronic public forum dedicated to radio broadcasting; and (v) authorizes seizure of microradio stations' broadcasting equipment without the procedural safeguards constitutionally mandated to minimize the risk of prior restraints on protected expression, prevent unreasonable searches and seizures, and ensure due process of law. Plaintiffs also seek declaratory relief holding that the FCC's present enforcement policies and practices in regard to unlicensed microradio stations violate their rights under the First, Fourth, and Fifth Amendments to the United States Constitution and Section 312 of the Act. 47 U.S.C. § 312.

Plaintiffs further seek injunctive relief enjoining the government from civilly and criminally prosecuting them for their microradio broadcasting activities, closing their microradio stations, confiscating their broadcasting equipment, and otherwise interfering with their microradio broadcasts.

JURISDICTION AND VENUE

1. This case arises under the First, Fourth, and Fifth Amendments to the United States Constitution, and 47 U.S.C. §§ 301, 307, 309, 312, and 510. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1346(2), 2201, and 2202. The Court may grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 et seq., and Rule 57 of the Federal Rules of Civil Procedure ("FRCP"). The Court may grant injunctive relief pursuant to FRCP Rule 65.

2. Venue is proper in the Southern District of New York, the federal judicial district in which a substantial part of the events giving rise to plaintiffs' claims occurred, the organizational plaintiffs are headquartered, and the individual plaintiffs reside. 28 U.S.C. §§ 1391(e)(2) and (3), and 1402(a)(1).

PARTIES

3. Plaintiff FREE SPEECH is an unincorporated association of persons, most of whom reside in the Southern District of New York, who have joined together to foster the development of microradio stations in New York City. Free Speech's members include individuals who have engaged in, or seek to engage in, microradio broadcasts in New York City. Free Speech brings this lawsuit on its own behalf and on behalf of its members through its co-founder Greg Ruggiero, who is authorized to bring this lawsuit on behalf of the association and its members.

4. Plaintiff STEAL THIS RADIO ("STR") is an unincorporated association of persons who have collectively operated a noncommercial microradio station on the Lower East Side of New York City since November 1995. STR is entirely supported by contributions from its members, who collectively purchased and own STR's broadcasting equipment. STR receives no corporate or other private or public funding. None of STR's members, its producers or DJs, receive any remuneration for their work with the station. STR brings this lawsuit on its own behalf and on behalf of its members through the DJs named below as individual plaintiffs, each of whom is authorized to bring this lawsuit on behalf of the association and its members.

5. Plaintiff DJ THOMAS PAINE is a pseudonym for a citizen of the United States who resides within the Southern District of New York, is a member of STR, and hosts "Radio Zapatista," a weekly show of Zapatista communiqués, interviews, news, and music broadcast on STR's microradio station.

6. Plaintiff DJ CARLOS RISING is a pseudonym for a citizen of the United States who resides within the Southern District of New York, is a member of STR, and hosts "The Bread Is Rising," a weekly show of poetry readings broadcast over STR's microradio station.

7. Plaintiff DJ SHARIN is a pseudonym for a citizen of the United States who resides in the Southern District of New York, is a member of STR, and hosts "Taking It to the Streets," a weekly underground talk, philosophy, and music show broadcast over STR's microradio station.

8. Plaintiff DJ.E.S.E. is a pseudonym for a citizen of the United States who resides within the Southern District of New York, is a member of STR, and hosts "Droppin' It," a weekly show of drop poetry, hip-hop and rhythms broadcast over STR's microradio station.

9. Plaintiff FRANK MORALES is a citizen of the United States who resides on the Lower East Side of New York City, in the Southern District of New York. Mr. Morales regularly listens to STR's microradio broadcasts and depends on those broadcasts for current news and information about his neighborhood and community.

10. Plaintiff JOAN MUSSEY is a citizen of the United States who resides on the Lower East Side of New

York City, in the Southern District of New York. Ms. Mussey regularly listens to STR's microradio broadcasts and depends on those broadcasts for current news and information about her neighborhood and community.

11. Defendant JANET RENO is the Attorney General of the United States and the Chief Executive Officer of the United States Department of Justice. In that capacity, she has the final authority to decide whether or not to institute criminal or civil proceedings for violations of any provision of Title III of the Act. 47 U.S.C. §§ 301 et seq. Defendant Reno is being sued only in her official capacity.

12. Defendant UNITED STATES DEPARTMENT OF JUSTICE ("Justice Department") is the agency of the United States responsible for civilly and criminally prosecuting violations of federal laws, including Title III of the Act. 47 U.S.C. §§ 301 et seq.

13. Defendant FEDERAL COMMUNICATIONS COMMISSION ("FCC") is the agency of the United States that has principal responsibility for administering the Act. The FCC has final authority to decide whether to bring administrative proceedings for violations of Title III of the Act. 47 U.S.C. §§ 301 et seq. The FCC may also request that the Justice Department civilly and/or criminally prosecute violations of Title III.

GENERAL ALLEGATIONS

The Medium of Radio Broadcasting

14. Although radio is the oldest of the electronic mass media, it remains a vitally important and powerful medium today, largely because of its pervasiveness and portability. There are approximately one billion radios in the United States, with nearly every home having at least one radio and nearly every automobile equipped with a radio. Roughly 25 million persons own "walkmen." The average adult spends over two-and-one half hours daily listening to the radio, while 95% of all persons over 12 years of age listen to the radio for some portion of the day.

15. Because radio is uniquely pervasive and portable, it reaches many persons who lack access to other electronic mass media, including those who cannot afford to subscribe to cable television service, own a personal computer, or access the Internet. Radio is thus vitally important to the economically disadvantaged in society, including the homeless, who rely solely on this medium for critical news and information.

The Evolution of Radio Broadcasting Regulation

16. In 1895, Guglielmo Marconi successfully demonstrated that messages could be transmitted through the air. A year later, Marconi received the first patent on the "radiotelegraph" or "wireless" system. The new technology was first used for ship-to-ship and ship-to-shore communications. By 1904, the United States Navy had 20 shoreline wireless stations and 24 ships equipped with radiotelegraph systems. By then, the Marconi Wireless Telegraph Company of America was providing ship-to-ship and ship-to-shore communications for commercial shipping operations, as well as transmitting news dispatches and commercial messages across the Atlantic, in competition with international cable companies.

17. Between 1907 and 1912, literally hundreds of "amateurs" began operating wireless stations in communities all across the United States, creating an informal network of communications for persons to share their views with distant speakers and listeners. The proliferation of amateur stations soon prompted concerns about potential interference with naval and commercial wireless operations -- concerns that only intensified with charges (uncorroborated) that amateur stations had interfered with ship-to-shore communications and transmitted false reports on the safety of passengers during the Titanic disaster in April 1912.

18. Four months later, in August 1912, Congress enacted the Radio Act of 1912. Pub. L. No. 62-264, 37 Stat. 302 (1912). The 1912 Radio Act required all wireless operators, including amateurs, to be licensed by the Secretary of Commerce. Applicants were required to specify the exact wavelengths at which they proposed to operate. Wavelengths from 600 to 1600 meters were reserved for the United States Navy, wavelengths between 300 and 600 meters were allocated to commercial wireless stations (most of which were affiliated with Marconi), and wavelengths below 200 meters (the least desirable portion of the spectrum) were reserved for amateur stations. In theory, anyone could apply for a license to operate a wireless station, and, in theory, the Secretary of Commerce was obligated to issue such license. (See ¶¶ 22-23 infra.)

19. Despite the inferior spectrum allocation and the new license requirement, amateurs continued to dominate the airwaves. By early 1917, there were almost 14,000 licensed amateur stations, roughly twice the number of licensed commercial stations. When the United States declared war on Germany in April 1917, all amateur stations were ordered to cease operations. Those which refused to sign off were forcibly closed down. In the first ten days of April, 1917 alone, the New York City Police Department confiscated equipment from

800 amateur stations. Following the November 1918 Armistice, amateur stations were allowed to resume operations. By late 1919, they were again dominating the airwaves.

20. With the start of regular broadcasts over Westinghouse Electric Corporation's KDKA (run by Westinghouse employee and amateur radio operator Frank Conrad) in Pittsburgh on November 2, 1920, radio suddenly became a mass medium. By 1922, there were more than 500 licensed commercial broadcast radio stations in the United States. The new mass medium was not, however, an exclusively commercial domain, as many noncommercial broadcast radio stations were operated by colleges, universities churches, and labor unions. Indeed, the premiere issue of Radio Broadcast heralded broadcast radio as "the people's university," with the potential to make government "a living thing to its citizens."

21. Alarmed by the growing interference among broadcast radio stations, Secretary of Commerce Herbert Hoover convened the First National Conference on Radio Telephony in late February 1922. At the conference, Hoover called the spectrum a public resource, insisting on a "public right over the ether roads." Minutes of Open Meetings of Department of Commerce Conference on Radio Telephony, Feb. 27-28, 1922, at 4-5.

22. Hoover also began denying applications for broadcast radio licenses on the grounds that applicants would create intolerable interference if granted licenses. The United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), however, ruled in 1923 that Hoover lacked authority under the 1912 Radio Act to deny licenses. Hoover v. Intercity Radio Co., 286 F. 1003 (D.C. Cir. 1923). Despite the ruling, Hoover continued to limit the number of broadcast radio licenses by restricting available frequencies, times of operation, and locations, as well as by delaying action on pending license applications.

23. In April 1926, another court ruled that Hoover lacked authority under the 1912 Radio Act to deny licenses or limit stations to certain frequencies. United States v. Zenith Radio Corp., 12 F.2d 614 (N.D. Ill. 1926). After the Attorney General concurred with that ruling, 35 Ops. Atty. Gen. 126 (1926), Hoover abandoned all attempts to limit or restrict new broadcast radio stations. Nearly 200 new stations went on the air between July 1926 and February 1927, greatly increasing the levels of interference.

24. Responding to the ensuing chaos of the airwaves, Congress enacted the Radio Act of 1927. Pub. L. No. 98-50, 44 Stat. 1162 (1927). The 1927 Radio Act created the Federal Radio Commission ("FRC") to allocate bands of the spectrum to the various radio services, allot frequencies within each band to various geographic areas, and issue licenses to individual radio stations. Radio stations licensed by the FRC were given privileges to use assigned frequencies on an exclusive or shared basis in given geographic areas for up to three-year renewable terms. In theory, anyone could apply for a broadcast radio license from the FRC.

25. Under the 1927 Radio Act, the FRC was charged with exercising its regulatory powers to serve the "public interest, convenience and necessity," a standard borrowed from common carrier regulatory schemes and described by the FRC's first general counsel as "broad and vague" and "mean[ing] about as little as any phrase" in the 1927 Radio Act. See Caldwell, The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927, 1 Air L. Rev. 295, 296 (1930).

26. Acting under its "public interest, convenience and necessity" mandate, the FRC adopted General Order 40 in August 1928, creating 40 clear channels, 34 regional channels, and 30 local channels. Under the same vague mandate, the FRC awarded most of the licenses to broadcast on clear and regional channels to large commercial stations having powerful transmitters, while requiring noncommercial stations to share local channels with other commercial stations.

27. Declaring that the "public interest, convenience and necessity" was better served by "general public service" (i.e., commercial) stations than by "special interest" and "propaganda" (i.e., non-commercial) stations, the FRC gave noncommercial stations fewer hours than commercial stations to broadcast on their shared local channels. Moreover, to reduce the number of broadcast radio stations, the FRC limited broadcast radio licenses to threemonth terms, effectively requiring noncommercial stations to expend their limited financial resources fending off license renewal challenges from commercial stations every three months.

28. As a result of the policies adopted by the FRC under its vague "public interest, convenience and necessity" mandate, noncommerical radio broadcasting in the United States virtually disappeared between 1927 and 1934, accounting for only 2% of all radio airtime by 1934. By the early 1930's, commercial stations affiliated with the National Broadcasting Company ("NBC") and the Columbia Broadcasting System ("CBS") radio networks represented 70% of all radio airtime.

29. As the quid pro quo for their government-granted exclusive privileges to broadcast over spectrum dedicated to radio broadcasting -- a scarce public resource -- commercial stations were required by the FRC

to serve as "public trustees," in theory, offering a "well-rounded" schedule of programming responsive to community needs, covering issues of public importance, and airing contrasting viewpoints.

The Current Regulatory Scheme for Radio Broadcasting

30. In 1934, the FRC's regulatory authority over spectrum usage, including radio broadcasting, was transferred, virtually intact, to the newly created FCC. The FCC's authority to regulate spectrum usage, including radio broadcasting, is presently found in Title III of the Act. 47 U.S.C. §§ 301 et seq.

31. Under Section 303 of the Act, the FCC may classify radio stations into various broadcast and non-broadcast services, allocate bands of frequencies to the respective services, allot frequencies within each band for use in different geographic areas, assign particular frequencies for use by individual radio stations, and determine the power at which each station may operate. 47 U.S.C. §§ 303(a)-(d); see also 47 U.S.C. § 307(b). The FCC exercises those powers "as public convenience, interest, or necessity requires." 47 U.S.C. § 303 (preamble).

32. Since the 1920's, frequencies at and above 535 kilohertz ("Khz") have been used for amplitude modulation ("AM") radio broadcasting. The AM band is currently located between 535 Khz to 1620 Khz. 47 C.F.R. Pt. 2 (1998). AM radio stations licensed to broadcast in that band typically operate at power levels between 250 watts and 50,000 watts (50 kilowatts). 47 C.F.R. §§ 73.25-27 (1998). Because of the policies adopted by the FRC under its vague "public interest, convenience and necessity" standard in the late 1920's (see ¶¶ 26-28 supra), the AM band has become the virtually exclusive domain of commercial radio stations.

33. Although FM radio broadcasting was invented in the 1930's, the FCC did not allocate spectrum for the new service until the early 1940's and abruptly changed that spectrum allocation shortly after World War II, thus rendering all existing FM receivers obsolete. Since 1945, the spectrum from 88 to 108 Mhz has been allocated for FM radio stations. Under its "public interest, convenience and necessity" mandate, the FCC initially awarded most FM licenses to existing AM commercial radio stations, allowing them for many years to "simulcast" the same radio programming over their AM and FM radio stations. The "simulcast" policy effectively limited the development of FM radio as an alternative to AM radio until that policy was repealed by the FCC in the late 1960's.

34. Since the late 1940's, the FCC has reserved frequencies from 88 to 92 Mhz for educational, noncommercial broadcasting. 47 C.F.R. § 73.201 (1998). Because few colleges, universities, and non-profit entities could afford to operate full-power FM radio stations, the FCC, beginning in 1948, allowed them to broadcast with as little as 10 watts of power, effectively letting community radio stations operate between 88 and 92 Mhz for nearly 30 years.

35. Beginning in 1978, the FCC has required all new educational, noncommercial FM radio stations to operate with at least 100 watts of power and relegated existing 10-watt stations to "secondary" status, forcing them to relocate to other frequencies and/or locations if they interfere with full-power broadcast station signals. See 47 C.F.R. §§ 73.209, 73.211 (1998); Changes in Rules Relating to Noncommercial Educational FM Broadcast Stations, 69 F.C.C.2d 240 (1978) ("Second Report and Order"), modified, 70 F.C.C.2d 972 (1979). The 100watt requirement for new educational, noncommercial stations was adopted by the FCC under its "public interest, convenience and necessity" mandate, ostensibly to ensure more "efficient" and "effective" educational, noncommercial FM radio service. See, e.g., Second Report and Order, 69 F.C.C.2d at 248.

36. Urging stronger children's TV rules two years ago, William Kennard, then the FCC's General Counsel and now the FCC's Chairman, described the broadcast spectrum as a "public forum" (albeit a "limited" one in the case of spectrum set aside for broadcast television) in an article published in the Washington Legal Times. W. Kennard & J. Nuechterlein, Heeding Congress' Call on Kids' TV, Legal Times, Jan. 8, 1996, at 29. (A copy of this article and a subsequent letter to the editor of the Legal Times coauthored by Kennard are attached as Exhibit A.)

37. Section 301 of the Act prohibits anyone from operating a radio station -- broadcast or non-broadcast -- except with a license granted by the FCC. 47 U.S.C. § 301. (But see ¶ 43 infra.) Under Section 307 of the Act, the FCC may grant and renew a radio broadcast license to exclusively use (or share) a frequency in a given region or on a nationwide basis for a term of eight years if the "public convenience, interest, or necessity will be served thereby." 47 U.S.C. §§ 307(a), (c), (d). See also 47 U.S.C. § 309(a). In theory, anyone may apply for a broadcast radio license from the FCC, though, as a practical matter, few have the financial resources necessary to successfully pursue such a broadcast radio license. (See ¶ 38 infra.)

38. Section 308(b) of the Act requires all applications for radio station licenses to, inter alia, "set forth such facts as the [FCC] by regulation may prescribe as to the citizenship, character, financial, technical and other

qualifications of the applicant to operate [a radio] station." 47 U.S.C. § 308(b). Because of the highly technical nature of the application process, applicants must usually hire an attorney and an engineering consultant familiar with the FCC's application procedures. Even when an application is uncontested (but see ¶ 39 infra), an applicant typically must spend in excess of $100,000 to secure a broadcast radio license from the FCC.

39. The FCC often receives two or more applications for the same radio station license. Because the grant of one "mutually exclusive" application would necessarily preclude the grant of the other applications, the FCC has traditionally held a comparative hearing, under the so-called Ashbacker doctrine, Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), to select the applicant that would best serve the "public convenience, interest, or necessity." 47 U.S.C. §§ 307(a), 309(a).

40. The FCC has long structured its comparative assessment of mutually exclusive license applications according to its 1965 Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965) ("1965 Policy Statement"), under which the "public interest, convenience and necessity" is defined in terms of two broad objectives: providing the "best practicable service to the public" and securing the "maximum diffusion of control of the media of mass communications." Id. at 394. The FCC's 1965 Policy Statement identifies six principal, but non-exclusive, factors relevant to these two objectives: localism; integration of ownership with management; past broadcast record; proposed programming service; character; and efficient use of the spectrum. Id. at 394-99.

41. The FCC's comparative assessment of mutually exclusive applications is typically made in a trial-type comparative hearing before an administrative law judge, who hears evidence and renders a written decision which may be appealed to the FCC's Review Board and then to the full Commission. 47 C.F.R. §§ 1.276, 1.282 (1998). The losing applicant often seeks review of the FCC's final decision in the D.C. Circuit. 47 U.S.C. § 402(b). The comparative hearing and subsequent administrative and judicial appeals greatly increase the already significant cost of securing a radio station license from the FCC. (See ¶ 38 supra.)

42. Despite the structure provided by the 1965 Policy Statement, the FCC's comparative assessment of mutually exclusive applications remains heavily criticized as producing arbitrary results. See, e.g., Anthony, Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings, 24 Stanford L. Rev. 1 (1971). Five years ago, the D.C. Circuit declared the FCC's manipulation of the important "integration" factor (see ¶ 40 supra) to be arbitrary and capricious. Bechtel v. FCC, 957 F.2d 873 (D.C. Cir. 1992). One year later, the D.C. Circuit again ruled that the FCC's application of the integration criteria was arbitrary and capricious. Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993). Since then, the FCC has failed to develop new comparative hearing criteria.

43. In part to eliminate a backlog of FM radio station applications occasioned by the Bechtel decision, Congress recently amended Section 309 of the Act to authorize the FCC, in the case of mutually exclusive applications, to award licenses based on "a system of competitive bidding" if the FCC determines that such a system will promote certain objectives such as the "efficient and intensive use of the electromagnetic spectrum." 47 U.S.C. § 309(j).

44. In recent years, Congress has also amended Section 307 of the Act to authorize the FCC by rule to exempt four radio services from the radio station license requirement: (a) citizens band radio service; (b) radio control service; (c) aviation radio service; and (d) maritime radio service. 47 U.S.C. § 307(e)(1). All radio station operators authorized by the FCC under one of these exemptions to operate without a license must still comply with other applicable provisions of Title III, as well as applicable FCC regulations. 47 U.S.C. § 307(e)(2).

45. As former FCC Chairman Reed E. Hundt has observed, "[t]he FCC essentially dismantled the public interest standard in the early 1980's by conflating the 'public interest' with anything sponsors will support." Hundt, The Public's Airwaves: What Does the Public Interest Require of Television Broadcasters, 45 Duke L.J. 1089, 1094 (1996). The FCC thus significantly deregulated broadcast radio stations, dropping, for example, requirements that stations devote a certain percentage of their broadcast week to public affairs programming and undertake ascertainment studies of community programming needs. See Deregulation of Radio, 84 F.C.C.2d 968 (1981), petition for reconsideration denied, 87 F.C.C.2d 797 (1981), aff'd in part and rev'd in part sub nom., Office of Communications of United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983).

46. In the late 1980's, the FCC also repealed the Fairness Doctrine, which had required broadcasters to cover controversial issues of public importance and air contrasting viewpoints on those issues, in part because the FCC doubted the continuing validity of the scarcity rationale on which the notion that broadcasters had to serve as "public trustees" of the airwaves rested. (See ¶ 28 supra.) In re Complaint of Syracuse Peace Council Against Television Station WTVH Syracuse, New York, 2 F.C.C. Rec. 5043, 5054-55, 5057-58

(1987), aff'd sub nom., Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989).

47. The FCC has several ways in which to proceed against unlicensed radio stations, two of which are at issue in this action. First, under Section 312(b), the FCC may order a microradio station such as STR to "cease and desist" its unlicensed broadcasts. 47 U.S.C. § 312(b). Before the FCC may issue a cease and desist order, however, the agency must serve an "order to show cause" on the station, which:

shall contain a statement of the matters with respect to which the [FCC] is inquiring and shall call upon [said] station to appear before the [FCC] at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the [FCC] may provide in the order for a shorter period.

47 U.S.C. § 312(c). At the required hearing, the FCC has the burden of proceeding with the introduction of evidence and the burden of proof. 47 U.S.C. § 312(d).

48. Second, any broadcasting equipment knowingly used in violation of the Act may be seized by the Attorney General and forfeited to the United States upon process issued pursuant to the supplemental rules for certain admiralty and maritime claims by any district court of the United States having jurisdiction over the equipment. 47 U.S.C. §§ 510(a)-(b); see also Supplemental Rules for Certain Admiralty and Maritime Claims, Rule B. As applied here, these "in rem" rules provide for seizure of a microradio station's expressive instrumentalities and materials, including broadcasting equipment, without any prior judicial determination as to whether the station was engaging in protected expression.

The Decline in Local Radio Programming

49. Over the last decade, a number of factors have contributed to a significant decline in local radio programming heard on licensed broadcast radio stations. They include the FCC's deregulation of licensed broadcast radio stations in the 1980's; the increased concentration of radio station ownership in recent years; the decline in the already abysmally low levels of minority ownership of radio stations; the resurgence of nationally delivered network radio programming; and, of course, the FCC's rule requiring new noncommercial educational FM radio stations to operate with at least 100 watts of power.

50. Since the FCC significantly deregulated licensed broadcast radio stations in the 1980's, various industrywide programming surveys have documented a sharp decline in news coverage, including local news coverage, aired on music stations, which predominate on the FM dial.

51. Before 1950, broadcast radio stations heavily relied on nationally delivered network programming. (See ¶ 28 supra.) With the advent of television, however, broadcast radio, out of economic necessity, became more of a local medium in the 1950's and 1960's, albeit one increasingly subject to rigid formats by the 1960's. In recent years, there has been a resurgence of nationally-delivered network programming, now distributed via satellite, with a consequent decline in local radio programming.

52. In 1996, Congress lifted the nationwide ceiling on the number of radio stations which any single person or entity could own. Since then, roughly 4,000 of the nation's 11,000 radio stations have been traded, with the largest station group owners being the most aggressive buyers. As a result, the radio industry has become significantly more concentrated over the past two years. The 10 largest group owners today control 1,134 radio stations, up from 652 in 1996. Several FCC Commissioners have publicly expressed concern that the increased concentration of radio station ownership in the hands of a few large station group owners will stifle the diversity of voices and localism in radio. (See Exhibit B.)

53. The recent wave of mergers in the radio industry has been accompanied by a marked decline in the already abysmally low minority ownership of broadcast stations. The United States Department of Commerce recently reported that only 2.8% of all commercial radio and TV stations were owned by minorities in 1997, down from 3.1% in 1996, prompting FCC Chairman Kennard and FCC Commissioner Michael Powell to publicly express concern over the potential adverse effect on diversity in radio programming. (See Exhibit C.)

54. Even though African Americans today comprise more than 10% of the population in the United States, only 42 of the roughly 1,600 public radio stations in the United States are run by African Americans, just seven of which had qualified for community service grants from the Corporation for Public Broadcasting to buy and upgrade equipment and facilities, as of several years ago.

55. Finally, the FCC's rule requiring new noncommercial, educational FM radio stations to operate with at least 100 watts of power, adopted in 1978 (see ¶ 35 supra), has been a significant contributing factor to the decline in local radio programming by community radio stations.

The Growth of Microradio Stations and the FCC's Crackdown

56. Microradio developed in response to the dearth of community programming on licensed radio stations in the 1990's. There are today perhaps 1,000 microradio stations operating well below 100 watts of power in the United States. None of these stations have broadcast licenses from the FCC, nor can they obtain such licenses. (See ¶ 35 supra.) The great majority of these microradio stations currently operate without interfering with the broadcasts of licensed radio stations or posing a threat to public safety. Most of these unlicensed microradio stations provide community programming, including core political speech, thus restoring localism to the medium of radio. (Attached as Exhibit D are copies of recent USA Today and Time magazine articles on the nationwide emergence of microradio stations over the past decade.)

57. Rather than expeditiously acting to license microradio stations so that the "public convenience, interest, [and] necessity" will be better served, 47 U.S.C. § 307(a), the FCC has instead intensified its efforts to shut down such stations, at the urging of the National Association of Broadcasters ("NAB"), the commercial broadcast industry's trade association, which has lobbied the FCC "to rid the airwaves of radio pirates." (See Exhibit E.)

58. To shut down microradio stations, the FCC has increasingly relied on the "in rem" procedures available under Section 510 of the Act, 47 U.S.C. § 510 and Rule B of the Supplemental Rules, allowing for seizure of a microradio station's broadcasting equipment without affording the station a hearing on its First Amendment defense either before or after the seizure. See, e.g., United States v. Any and All Radio Station Transmission Equipment, Etc., 976 F. Supp. 1255 (D. Minn. 1997).

59. The FCC has also demanded -- orally and in writing -- that microradio stations cease and desist from broadcasting, without first affording them an oral hearing, upon 30 days' notice, at which the FCC has the burden of proceeding with introduction of evidence and burden of proof, as required by Sections 312(c) and (d) of the Act. 47 U.S.C. §§ 312(c), (d). (Attached as Exhibit F is a copy of one such "cease and desist" letter.)

60. Finally, some FCC officials have acted to shut down microradio stations by any means necessary to accomplish the task, regardless of their basis in law. (See ¶¶ 73-75 infra.)

SPECIFIC ALLEGATIONS CONCERNING PLAINTIFFS

61. The trend toward consolidation of radio station ownership is also apparent in New York City, where CBS now owns both of the primary all-news radio stations (WCBS and WINS) and three station group owners (CBS, Emmis Broadcasting, and Chancellor Media) now own music stations that are tuned in to by 41% of the weekly listening audience in the Metropolitan New York City area.

62. It was in this tightly controlled radio environment that STR was formed in late 1995 by a group of tenant activists on the Lower East Side who had long been dissatisfied with mainstream media coverage of important housing issues in that part of the City.

63. From the outset, STR's goal was not only to fill the void in media coverage on Lower East Side housing issues, but also to provide an outlet for other local news, information, and music of interest to Lower East Side residents who have long been ignored by mainstream media in the City. The moniker "Steal This Radio" was selected to signify not that STR operated an unlicensed microradio station but rather that STR operated a community based, people's microradio station using a portion of the spectrum dedicated to radio broadcasting -- spectrum that had been off-limits to new community radio stations since 1978. (See ¶ 35 supra.)

64. STR began broadcasting on the Lower East Side in November 1995 over the frequency 88.7 Mhz on the FM dial, selected by STR because it was a vacant channel with no FM radio station in New York City broadcasting on a frequency any closer than .2 Mhz on either side. STR initially broadcast at five watts of power, soon moved up to 10 watts of power, and now broadcasts at 20 watts of power, allowing its signal to be heard by approximately 100,000 people, who live or work within a radius of one mile of STR's transmitter.

65. Through the end of 1995, STR broadcast only on Friday nights, typically from community centers and the living rooms of various apartments on the Lower East Side, mixing community news and music, all of which STR aired without commercials. During this period, STR broadcast from a different location every Friday night.

66. In about January, 1996, STR began broadcasting three nights a week from a rented studio located in a

building on East 7th Street between Avenues B and C, where individuals and community groups from the Lower East Side could broadcast their own programming over STR's microradio station. STR's decision to broadcast from a fixed, rather than mobile, studio was made, in large part, to facilitate such open access and participation by individuals and community groups on the Lower East Side.

67. Beginning in April 1996, STR expanded its broadcasts to five nights a week. From July 1996 until February 1998, STR broadcast seven nights a week, typically from 6 p.m. until dawn. STR's weekly schedule of programming, all of which is broadcast without commercial advertising or commercial sponsorship, includes community news, political interviews and commentary, alternative health care, social and cultural shows, and specialty music shows, some in English and some in Spanish -- an eclectic mix of programming unlike anything heard on commercial and noncommercial radio stations in New York City. (Attached as Exhibit G is a copy of STR's program schedule for February 1998).

68. STR's microradio station quickly developed a significant listening audience, largely comprised of Lower East Side residents who tuned in to hear news and information about their neighborhood or to listen to music not played anywhere else on the radio dial. These broadcasts even attracted the attention of "The Paper of Record." Strauss, Radio Station for Its Neighbors, Not the FCC, N.Y. Times, Feb. 27, 1996, at B6. (Attached as Exhibit H is a copy of this article.)

69. STR has neither applied for nor obtained a broadcast license from the FCC. An application for such a license would have been an exercise in futility, since the FCC no longer issues broadcast licenses to noncommercial, educational FM radio stations operating at less than 100 watts of power. (See ¶ 35 supra). Moreover, even if the FCC were to issue broadcast radio licenses to FM radio stations operating at less than 100 watts of power, STR, like virtually every other microradio station across the country, simply could not afford the enormous sums necessary to secure a broadcast radio license from the FCC. (See ¶¶ 38-41 supra.)

70. From its initial broadcast in late November 1995 through late February 1998, STR received only one complaint that its broadcasts were interfering with reception of another radio station on the Lower East Side. That single complaint came in the form of a late night telephone call from an individual claiming to work for WRHU, the Hofstra University public radio station based in Hempstead, Long Island, whose primary and secondary coverage areas do not even encompass New York City, let alone the Lower East Side. To the best of plaintiffs' knowledge, there has never been a formal complaint of radio interference filed by WRHU or any other radio station at the FCC against STR.

71. Although STR openly broadcast almost daily from its fixed studio in a building on East 7th Street between Avenues B and C on the Lower East Side from January 1996, the FCC never once contacted STR prior to March 4, 1998, to discuss either STR's unlicensed broadcasts or any alleged interference those broadcasts posed to other radio stations.

72. On Saturday and Sunday, February 20-21, 1998, STR participated, along with Radio Mutiny, a microradio station based in Philadelphia, in a widely publicized all-day workshops on starting up microradio stations, sponsored by the New York Free Media Alliance and held in community centers in East Harlem and the South Bronx. These workshops were well-attended, as was a microradio benefit concert on the previous Friday night, February 19, 1998. (Attached as Exhibit I is a copy of the brochure publicizing the three-day microradio event.)

73. On Thursday evening, March 4, 1998, less than two weeks after the widely publicized microradio benefit concert and microradio workshops in New York City (see ¶ 72 supra), an FCC official named Judah Mansbach visited the building from which STR broadcast, on East 7th Street between Avenues B and C on the Lower East Side. When a member of STR asked Mansbach as to the purpose of his visit, Mansbach replied that a complaint had been made that STR's broadcasts were interfering with reception of WRHU, Hofstra University's public radio station (see ¶ 70 supra), on the Lower East Side. While calling his visit "friendly," Mansbach stated that he would return with the U.S. Marshals to seize STR's radio broadcasting equipment if STR did not immediately cease and desist its broadcasting.

74. Although warning STR to immediately cease and desist its broadcasts on March 4, 1998, Mansbach made no mention of STR's statutory right under Section 312(c) and (d) of the Communications Act to an oral hearing, upon at least 30 days' notice, at which the FCC would have the burden of proof. 47 U.S.C. §§ 312(c), (d). Indeed, Mansbach implied that STR had no rights at all. Mansbach left nothing in writing during his visit.

75. Out of concern for other tenants in the building on East 7th Street between Avenues B and C, whose homes might be searched and personal possessions seized if Mansbach were to return with U.S. Marshals, STR reluctantly decided, on Saturday, March 6, 1998, to temporarily go off the air. Nonetheless, the following Thursday, Mansbach returned to the building, this time with officials from Con Edison, who, at

Mansbach's direction, turned off all electricity to the building, even though STR had been off the air for five days.

76. Subsequent to Mansbach's first visit to the building on East 7th Street between Avenues B and C, plaintiff Paine contacted Bruce Avery, WRHU's station manager, who confirmed for Paine that WRHU had never filed a formal complaint against STR with the FCC nor had the station ever experienced any signal interference from STR's broadcasts. Avery also confirmed that the Lower East Side was outside of WRHU's primary and secondary coverage areas.

77. In contrast to the supposed interference that STR's broadcasts cause to WRHU's signal on the Lower East Side, outside WRHU's primary and secondary coverage areas (see ¶ 70 supra), there are major commercial radio stations in New York City whose broadcasts regularly cause real signal interference to the broadcasts of other radio stations in the City, in their primary and secondary coverage areas. Nonetheless, the FCC has often chosen to ignore those significant signal interference problems.

IRREPARABLE INJURY

78. All of the plaintiffs engaged or seeking to engage in microbroadcasting are suffering ongoing irreparable injury to their First Amendment rights because the Act's broadcast license scheme and the FCC's enforcement of that scheme have deterred them from engaging in speech activity that is protected by the First Amendment.

79. Plaintiffs Frank Morales and Joan Mussey are suffering ongoing irreparable injury to their First Amendment rights because the Act's broadcast license scheme and the FCC's enforcement of that scheme, have interfered with their right to receive information and ideas and be informed about public issues.

80. On April 15, 1998, STR resumed its daily broadcasts from a new location. Absent interim injunctive relief, there is an imminent threat that the FCC will shut down STR's microradio station, confiscate its radio equipment, and prosecute STR's members civilly or criminally.

81. Absent interim injunctive relief, there is an imminent threat of civil and criminal enforcement proceedings against members of plaintiff Free Speech who elect to engage in microradio broadcasts, either through their own or other radio stations.

82. Plaintiffs have no adequate remedy at law.

FIRST CLAIM FOR RELIEF

(Unreasonable Time, Place and Manner Regulation)

83. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as if restated herein.

84. The spectrum dedicated to radio broadcasting is a public forum of virtually unlimited character by tradition and designation.

85. Section 301 of the Act, 47 U.S.C. § 301, violates plaintiffs' rights to freedom of speech under the First Amendment to the United States Constitution to the extent that it requires microbroadcasters to first obtain broadcast licenses from the FCC, burdening substantially more speech than necessary to serve the government's interest in preventing signal interference and ensuring public safety, and leaving microbroadcasters without adequate alternative channels of communications.

SECOND CLAIM FOR RELIEF

(Substantial Facial Overbreadth)

86. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as if restated herein.

87. Section 301 of the Act, 47 U.S.C. § 301, violates plaintiffs' rights to freedom of speech under the First Amendment to the United States Constitution to the extent that the broadcast license requirement imposes a restriction on broadcast speech that is substantially greater than necessary to accomplish the government interest in preventing signal interference and ensuring public safety.

THIRD CLAIM FOR RELIEF

(Monopolization of Electronic Public Forum)

88. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as if restated herein.

89. Section 307(a) of the Act, 47 U.S.C. § 307(a), violates plaintiffs' rights to freedom of speech under the First Amendment to the United States Constitution to the extent that it authorizes the FCC to grant broadcast licenses to exclusively use assigned frequencies (either within given geographic areas or on a nationwide basis) to a relatively few radio stations, controlled by even fewer media companies, thus allowing them to monopolize speech in the electronic public forum dedicated to radio broadcasting.

FOURTH CLAIM FOR RELIEF

(Virtually Unfettered Licensing Discretion)

90. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as if restated herein.

91. Sections 307(a) and 309(a) of the Act, 47 U.S.C. §§ 307(a), 309(a), violate plaintiffs' rights to freedom of speech and due process of law under the First and Fifth Amendments to the United States Constitution to the extent that they confer virtually unfettered discretion on the FCC to decide, under a vague "public interest" standard, who may and may not broadcast over the spectrum dedicated to radio broadcasting -- an electronic public forum of virtually unlimited character -- and under what conditions.

FIFTH CLAIM FOR RELIEF

(Taxation on Exercise of First Amendment Rights)

92. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as if restated herein.

93. Section 309(j) of the Act, 47 U.S.C. § 309(j), violates plaintiff's rights to freedom of speech under the First Amendment to the United States Constitution to the extent that it allows the FCC to issue broadcast licenses for FM radio stations based on a system of competitive bidding, thereby allowing the FCC to tax, and thereby infringe upon, the exercise of First Amendment rights in the electronic public forum dedicated to radio broadcasting.

SIXTH CLAIM FOR RELIEF

(System of Formal Prior Restraints)

94. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as if restated herein.

95. Section 510 of the Act, 47 U.S.C. § 510, as applied by defendants to microradio stations, violates plaintiff's rights to freedom of speech, security from unreasonable searches and seizures, and due process of law under the First, Fourth, and Fifth Amendments to the United States Constitution to the extent that it provides for the seizure and forfeiture of expressive instrumentalities and materials, including radio broadcasting equipment, without the rigorous procedural safeguards constitutionally mandated to minimize the risk of prior restraint on protected expression, prevent unreasonable searches and seizures, and ensure due process of law.

SEVENTH CLAIM FOR RELIEF

(System of Informal Prior Restraints)

96. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as if restated herein.

97. The FCC's enforcement policy and practice of demanding -- orally and/or in writing -- that microbroadcasters immediately cease and desist all broadcasting activities, without complying with the rigorous procedural safeguards constitutionally mandated to minimize the risk of prior restraint on protected expression, prevent unreasonable searches and seizures, and ensure due process of law violates plaintiffs' rights under the First, Fourth, and Fifth Amendments to the United States Constitution.

EIGHTH CLAIM FOR RELIEF

(Violation of Section 312)

98. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as if restated herein.

99. The FCC's enforcement policy and practice of demanding -- orally or in writing -- that microradio stations immediately cease and desist all broadcasting activities, without first affording them an administrative hearing, upon at least 30 days' notice, at which the burden of proceeding with the introduction of evidence and burden of proof are on the FCC, violate Sections 312(c) and (d) of the Act. 47 U.S.C. §§ 312(c), (d).

WHEREFORE, plaintiffs respectfully request that the Court enter a judgment:

A. Declaring that, on their face and as applied to microradio stations, Sections 301, 307(a), 309(a) and (j), and 510 of the Communications Act, as amended, 47 U.S.C. §§ 301, 307, 309(a) and (j), and 510, violate plaintiffs' rights under the First, Fourth, and Fifth Amendments to the United States Constitution;

B. Declaring that the FCC's policy and practice of demanding -- orally and in writing -- that microradio stations cease and desist from broadcasting, without first affording them an oral hearing, upon reasonable notice, at which the FCC has the burden of proceeding with introduction of evidence and burden of proof, violate plaintiffs' rights under the First, Fourth, and Fifth Amendments to the United States Constitution and Section 312 of the Communications Act of 1934, as amended, 47 U.S.C.
§ 312;

C. Preliminarily and permanently enjoining and restraining defendants, and their officers, agents, employees and successors, from shutting down plaintiffs' microradio stations, confiscating their broadcast equipment, or otherwise interfering with their microradio broadcasts;

D. Awarding plaintiffs their costs and attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. §§ 2412 et seq. ; and

E. Granting such other and further relief as to the Court seems just and proper.

Dated: May 12, 1998
Brooklyn, New York

_____
ROBERT T. PERRY
(RP1199)
509 12th Street, #2C
Brooklyn, New York 11215
(718) 788-1529

_____
BARBARA J. OLSHANSKY
(BO3635)
WILLIAM GOODMAN
THE CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway
New York, New York 10012
(212) 614-6439
Attorneys for Plaintiffs